

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

DURANTE ELECTRIC, INC.¹

Employer

and

Case 4–RC–19985

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL
UNION NO. 380, AFL–CIO²

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

¹ The Employer's name appears as amended at the hearing.

² The Petitioner's name appears as amended at the hearing.

5. The Employer, a Pennsylvania corporation, is engaged in the business of electrical contracting. The parties stipulated to the appropriateness of a unit consisting of electricians, apprentices and working electrical foremen working out of the Employer's Conshohocken, Pennsylvania facility, but disagree as to the status of four individuals: Nick Buffardi Jr., Dennis McDonough, Joshua Palladino, and Jason Smith. The Employer would exclude Buffardi and McDonough from the unit as supervisors within the meaning of Section 2(11) of the Act. The Employer also contends that Palladino resigned from employment with the Employer and is therefore ineligible to vote, and that Smith is a temporary employee and is therefore ineligible. The Petitioner would include Buffardi, McDonough, Palladino and Smith in the unit.

The Employer is an electrical contractor owned and operated by Daniel Durante. The Employer's electrical work force has fluctuated in size from Daniel Durante working by himself to as many as six employees. During April 2000, when the Employer was performing work on a CVS Pharmacy in Morrisville, Pennsylvania and the "401 Diner" in Conshohocken, Pennsylvania, the Employer's electrical work force consisted of the four disputed individuals and employees Jason Cirafisi and Buffardi's son Nick Buffardi III. On the morning of April 26, all six members of the Employer's electrical work force informed Durante that they were commencing a strike. None of these individuals have since returned to work at the Employer. At the time of the hearing, the Employer's non-striking electrical work force consisted of Durante and three employees.

The Employer hired **Nick Buffardi Jr.**, an electrician with 18 years experience, in October 1999. Buffardi, who became a job foreman for the CVS Pharmacy job, managed the Employer's work force crews using blueprints to determine and lay out the sequence of work, assigned work to each employee on the jobsite, and oversaw and directed their work to ensure that the work was done safely and according to the blueprints. Buffardi also showed inexperienced electricians how to perform electrical tasks. Buffardi was responsible for seeing that the crew had the proper equipment and sufficient manpower to get the work done, and for purchasing materials for the job from supply houses designated by the Employer. In addition to his foreman duties, Buffardi performed electrical work alongside other employees about 50 percent of his time. During the period from April 5 to 25, 2000, while Durante was on vacation, Buffardi operated the Employer's business. In addition to his regular foreman duties, Buffardi estimated jobs, returned telephone messages left for the Employer, handled emergency service calls from customers, assigned employees to respond to the calls, and billed the customers for services provided.

Durante testified that Buffardi had authority to hire employees and set their pay rates. Buffardi denied that the Employer ever told him he had the authority to hire or recommend hiring, but admitted he recommended three people for hire, Nick Buffardi III, Jason Cirafisi and Jason Smith. Buffardi recommended to Durante the starting wage rate for Buffardi and Cirafisi and set the starting wage rate for Smith. The record shows that Durante did not interview or meet Buffardi or Smith prior to agreeing to hire them. Indeed, Smith was hired by Buffardi when Durante was away. The evidence is disputed as to whether Durante interviewed Cirafisi prior to his hire. In addition, Durante accepted Buffardi's recommendation as to the starting wage rate for Buffardi and Cirafisi.

A finding of supervisory status is warranted only where the individual in question possesses one or more of the indicia set forth in Section 2(11) of the Act. *Providence Hospital*, 320 NLRB 717, 725 (1996), *enfd.* 121 F.3d 548, 156 LRRM 2001 (9th Cir. 1997); *The Door*, 297 NLRB 601 (1990). The statutory criteria are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Juniper Indus.*, 311 NLRB 109, 110 (1993). The statutory definition specifically indicates that it applies only to individuals who exercise “independent judgment” in the performance of supervisory functions and who act in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994). The authority “effectively to recommend,” an action listed in Section 2(11), means that the recommended action is taken with no investigation by an individual’s superiors, not simply that the recommendation ultimately is followed. *Polynesian Hospitality Tours*, 297 NLRB 228, 234 (1989), *enfd.* 920 F.2d 71, 135 LRRM 3238 (D.C. Cir. 1990), *cert. denied* 502 U.S. 810 (1991).

I find that Buffardi had authority to hire employees and to recommend effectively their hire, and that he used independent judgment in doing so. In the cases of Buffardi III and Jason Cirafisi, the Employer hired them on Buffardi’s recommendation without any further investigation, and also accepted Buffardi’s recommendations about their starting pay rates. In Jason Smith’s case, Buffardi recommended that an employee be hired because of jobsite needs, and when the Employer agreed, Buffardi selected and hired Smith, and set Smith’s pay rate without any further involvement by his superior. Indeed, Durante was abroad at the time Buffardi hired Smith and Buffardi had complete control of the Employer’s business. Accordingly, I find that Buffardi is a supervisor within the meaning of Section 2(11) of the Act and I shall exclude him from the bargaining unit. See *Union Square Theatre Management*, 326 NLRB No. 17, slip op. at 2-3 (1998), *Top Job Building Maintenance*, 304 NLRB 902, 903-905 (1991).

The Employer hired **Dennis McDonough**, an electrician with 10 years experience, in mid-March 2000. Initially, McDonough was employed primarily on the “401 Diner” job where he sometimes acted as a foreman or crew leader, but in April he was assigned to the CVS Pharmacy job where he worked under Buffardi’s direction. There is no evidence that McDonough exercised authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward or discipline employees, or effectively to recommend such actions. With respect to assigning and directing employees, Durante testified that McDonough’s job was to be in charge of a jobsite crew and to order materials and supplies for the job. In practice, McDonough sometimes worked at a jobsite where Buffardi was in charge, and at other times received instructions from Buffardi when McDonough was working with a crew out of Buffardi’s presence. When McDonough was responsible for “running a job” for the Employer, he used blueprints to lay out the work on the job, decided which work the employees would perform on a given day, and divided the work between the employees on the job. These tasks were apparently minor, as McDonough testified that he worked with the tools 100 percent of the time. Nor is there evidence that the tasks required the exercise of independent judgment, rather than McDonough’s experience as an electrician, ability to read the blueprints, and knowledge of the skills possessed by his crew members.

The burden of establishing supervisory status is on the party asserting that such status exists. *Bennett Indus.*, 313 NLRB 1363 (1994). See also *St. Francis Medical Center-West*, 323 NLRB 1046, 1047 (1997); *Northcrest Nursing Home*, 313 NLRB 491, 496 fn. 26 (1993). I find that the Employer has not carried its burden of establishing that McDonough is a supervisor within the meaning of Section 2(11) of the Act. Section 2(11) authority is not established when an employee directs another to perform discrete tasks stemming from the directing employee's experience, skills, training, or position, such as the direction given by a lead or journey level employee to another or apprentice employee. *Providence Hospital*, supra, 320 NLRB at 729. See also *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259 (11th Cir. 1999), enf. 325 NLRB No. 28, 1997 WL 792382 (1997). McDonough's use of blueprints and his electrical knowledge and experience to make routine assignments to employees on his crew does not establish that he is anything more than a leadman. See *Chevron Shipping*, 317 NLRB 379, 381-382 (1995).

With respect to employees **Joshua Palladino and Jason Smith**, I find that the record is insufficient to determine their eligibility. Palladino began working for the Employer in June 1999. On March 22, 2000, Palladino submitted a job application to State Electric, another employer, and at some point shortly thereafter accepted an offer of employment with State Electric. On Thursday, March 30, Palladino informed Durante that he was resigning from the Employer and going to work for State Electric because it offered him more money and better benefits. Palladino said that the effective date of his resignation would be April 13, two weeks, or two pay periods, later.³ Durante accepted Palladino's resignation. A few days later, Durante approached Palladino and offered him a \$1 hourly wage increase if Palladino would stay with the company. Palladino neither rejected nor accepted Durante's offer at that time, saying only that he would think about it. According to Durante, on April 5, immediately before he left for vacation, Buffardi told him that Palladino had rejected Durante's offer and would not stay. Durante left paychecks for employees for paydays during his vacation, but left no paycheck for Palladino for the period after the payroll period ending Wednesday, April 12. Palladino denied that he rejected or accepted Durante's offer prior to Durante's departure.

Buffardi approached Durante just before Durante's vacation and asked for authority to hire another employee because Palladino was leaving. Durante testified that Buffardi said he needed a temporary laborer on the CVS Pharmacy jobsite to "pull wire" through underground PVC conduits. Durante also testified that Buffardi told him that he would not need the employee after they were done. Durante testified that he understood that Buffardi would need the employee for a week and Durante left an envelope containing \$600 to pay the employee. Buffardi testified that Durante told him to use the new employee "whenever necessary." Buffardi hired Jason Smith and continued to employ him for three weeks until the employees went on strike. Durante testified that he called Buffardi during his vacation and asked Buffardi why Smith was still working after the wire had been pulled. He said that Buffardi told him that he needed Smith "a few more days."

Durante testified that, at another point during his vacation, Buffardi told him that Palladino was willing to stay for another week because his start at State Electric was postponed. Durante asked Buffardi if he really needed the extra hand given that Buffardi had also hired Smith. Buffardi said he needed Palladino, so Durante agreed that Palladino could stay another

³ The Employer's payroll periods run from Thursday to Wednesday each week, with payday on Thursdays.

week. Durante testified, however, that he told Buffardi that both Palladino and Smith should be gone when Durante returned from vacation. Palladino testified that, while Durante was on vacation, he decided to accept Durante's offer and to stay. Palladino says that he spoke with Buffardi about his intention and that both he and Buffardi agreed that Palladino would have to talk with Durante to accept Durante's offer. Buffardi testified that he called Durante during his vacation and told him that Palladino wanted to accept Durante's offer to increase his wage rate and to stay. Buffardi claims that Durante agreed and was happy to retain Palladino. In the same conversation, according to Buffardi, he told Durante that Smith was performing very well and that he still needed him on the job. Buffardi testified that Durante replied that he would keep Smith after he returned from his vacation. Durante specifically denied that this conversation occurred.

Smith worked for the Employer for three weeks from the time he was hired until April 26, when he joined the strike. Palladino also continued to work for the Employer until April 26. As noted above, the employees announced their strike to Durante immediately upon his return from vacation. At the time of the hearing, the Employer was employing only three employees, plus Durante, and was no longer pulling wire at the CVS Pharmacy job.

The record establishes that Palladino announced that he would resign on April 13 and that he accepted an employment offer from another employer. Durante offered Palladino a pay raise if he would stay, but there is a conflict in the witnesses' testimony about whether Palladino ever accepted the offer and agreed to stay. Palladino continued to work past his announced resignation date of April 13, but it is not clear whether he did so because he had accepted the offer and agreed to stay or whether this was merely a temporary delay in his resignation. With respect to Smith, the record establishes that he was hired as a temporary employee for a particular task that was soon completed. However, there is a conflict in the witness' testimony about whether the Employer decided to retain Smith indefinitely. Durante had no opportunity, after he returned from his vacation and learned that Palladino and Smith were still on his payroll, to take any actions with respect to them before Palladino, Smith and the other employees went on strike. In the absence of a basis on which to resolve the conflicting testimony about their employment status, I shall permit Joshua Palladino and Jason Smith to vote subject to challenge.

Based on the foregoing, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time electricians, apprentices and working electrical foremen working out of the Employer's Conshohocken, Pennsylvania facility, excluding all other employees, office clericals, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently,⁴ subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Additionally, eligible are those employees in the unit who have been employed for a total of 30 working days or more within the period of 12 months, or who have had some employment in that period and have been employed for a total of 45 working days within the 24 months immediately preceding the payroll period ending immediately preceding the date of this Decision, and also have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.⁵ Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

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LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within **7** days of the date of this Decision **3** copies of an election eligibility list, containing the **full** names and addresses of all the eligible

⁴ Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

⁵ *Steiny & Co.*, 308 NLRB 1323 (1992); *Daniel Construction*, 133 NLRB 264 (1961), modified in 167 NLRB 1078 (1967).

voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Clinic*, 315 NLRB 359, 361 (1994). The list must be clearly legible, and computer-generated lists should be printed in at least 12-point type. In order to be timely filed, such list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **July 3, 2000**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **July 10, 2000**.

Dated June 26, 2000

at Philadelphia, PA

/s/ Dorothy L. Moore-Duncan
DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four

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